

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI**

**BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No. 6778/DEL/2018 (A.Y 2012-13)

AND

I.T.A. No. 6779/DEL/2018 (A.Y. 2014-15)

M/s. NIIT Limited 8, Balaji Estate, 1 st Floor, Guru Ravi Das Marg, Kalkaji New Delhi, Delhi, India, 110019 (APPELLANT)	Vs	DCIT Central Circle-20, New Delhi (RESPONDENT)
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Appellant by	Sh. Ajay Wadhwa, Adv.
Respondent by	Ms. Rinku Singh, Sr. DR

Date of Hearing	16.07.2019
Date of Pronouncement	26.07.2019

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the assessee against the order dated 16.08.2018 passed by CIT(A)-27, New Delhi for assessment year 2012-13 and 2014-15.

2. The grounds of appeal are as under:-

ITA no. 6778/Del/2018 (A.Y 2012-13)

1. That on the facts and circumstances of the case, the order dated 16.08.2018 passed by the Learned Commissioner of Income-tax (Appeal) (herein after referred to as "Ld. CIT(A)" is bad in law and on facts.
2. That the Ld. CIT(A) has erred in sustaining the addition of Rs. 1,99,66,749/- made by the Ld. AO on account of disallowance of principal portion of the financial lease expenses and treating the same as capital expenditure.

2.1 That the ld. CIT(A) as well as ld. AO have failed to consider that the finance lease expenses are periodic lease rentals towards use of asset for normal business operations and are revenue in nature and therefore is an eligible business expenditure u/s 37(1) of the Income Tax Act, 1961. Further revenue and income earned by assessee by using these assets has been offered for tax.

2.2 That the accounting treatment of such expenditure cannot affect the treatment of the same under the Act for the purpose of computing the total income.

3. That the Ld. CIT(A) has sustained the addition without considering the supporting evidences in the form of invoices, confirmation, rental schedules and schedule containing the detail of assets.

4. That the Ld. CIT(A) has not considered the fact that the lessor, M/s. SREI Equipment Finance Pvt. Ltd. has itself offered the entire amount of lease rental received from the assessee for tax and addition of the same amount in the hands of the assessee tantamount to double taxation.

5. That the Ld. CIT(A) has not considered the undertaking given by the lessor stating that they had capitalized the asset given on lease to the assessee and claimed depreciation u/s 32 of the Income Tax Act, 1961, while filing the return of Income for AY 2012-13.

6. Without prejudice to the aforesaid grounds, the ld. CIT(A) ought to have allowed the depreciation u/s 32 of the Act on impugned addition of Rs. 1,99,66,749/- if he treated the same as capital in nature.

7. That the Ld. CIT(A) has not considered the Circular No. 2 of 2001 dated 9.2.2001: 247 ITR (St.) 53, issued by the Central Board of Direct Taxes ("CBDT") which clarifies that the distinction between operating lease and finance lease under accounting principles have no implications under the provisions of the Act.

8. That the grounds of appeal are without prejudice to each other.

9. That the appellant craves leave to add, alter, amend, substitute, delete and modify any or all the grounds of appeal, which are without prejudice to one another, before or at the time of hearing of the appeal."

ITA no. 6779/Del/2018 (A.Y. 2014-15)

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2. That the Ld. CIT(A) has erred in sustaining the addition of Rs. 2,67,38,822/- made by the Id. AO on account of disallowance of principal portion of the financial lease expenses and treating the same as capital expenditure.

2.1 That the Id. CIT (A) as well as Id. AO have failed to consider that the finance lease expenses are periodic lease rentals towards use of asset for normal business operations and are revenue in nature and therefore is an eligible business expenditure u/s 37(1) of the Income Tax Act 1961. Further revenue and income earned by the assessee by using these assets has been offered to tax.

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3. The facts and issues contested in the appeal for both the Assessment Years are identical; therefore, we are taking up the facts of A.Y. 2012-13. The assessee is engaged in business of information technology education and knowledge solutions. The assessee filed its return of income for assessment year 2012-13 on 30.11.2012 showing total income of Rs. 1,45,41,52,677/-. The assessee filed revised return on 31.03.2014 showing total income of Rs. 1,45,51,19,445/-. The same was processed u/s 143(1)

of the Income Tax Act, 1961. The case was selected for scrutiny and statutory notice u/s 143(2) of the Act was issued on 19.08.2015 and served upon the assessee. Notice u/s 142(1) of the Act along with detail questionnaire was issued on 19.08.2015. In response to the said notices CA of the Assessee appeared and attended the assessment proceedings from time to time. The assessee has shown income under the head "income from business or profession, income from house property and income from other sources". The Assessing Officer observed that the assessee has claimed deduction of Rs. 1,99,66,749/- in A.Y. 2012-13 on account of payments of principal amounts of finance lease. The assessee before the Assessing Officer submitted that the company has taken assets and vehicles on lease and the accounting treatment in the books of accounts is done as per Accounting Standard-19 issued by ICAI where finance lease are considered as financial arrangements and the leased assets are capitalized at an amount equal to present value of future lease payments and a corresponding amount is recognized as liability. The assessee further explained that the lease payments are apportioned between finance charge and reduction of outstanding liability in relation to the finance leased assets and since depreciation on such assets is not allowed and normal periodic payments are allowed as deduction for tax purposes, the lease payments claimed by the assessee in the Income Tax return should be allowed as business expenditure. In support of its contention assessee relied on Circular no. 2 of 2001 dated 09.02.2001 of CBDT and also relied upon the decision of Hon'ble Supreme Court in case of ICDS Ltd. vs. CIT 350 ITR 527. The Assessing Officer made disallowance of Rs. 1,99,66,749/- on account of finance lease expenses.

4. Being aggrieved by the assessment order the assessee filed appeal before the CIT(A). The CIT(A) partly allowed appeal of the assessee.

5. The Ld. AR submitted that the transaction enter into by the assessee with M/s. SREI Equipment Finance Ltd. is a simple sale and lease back transaction. There is involvement of two parties only i.e. M/s. NIIT Ltd.

(Lessee) and M/s. SREI Equipment Finance Ltd. (Lessor) in respect of transaction for sale and lease. The Ld. AR further submitted that the assets involved in the said transaction are intangibles, the existence of which can be established through financial statement of company capitalizing the cost of assets developed by the company, copyright certificates issued by the Registrar of Copyrights – Government of India, CD of the Software, Invoices raised by NIIT to its various customers who uses these softwares; various indirect taxes levied on the transaction of sale and renting of software. The Ld. AR submitted that since the company started developing these capital IPR's in financial year 2007-08 using its internal resources, had the company not capitalized the salary cost, the same would have been claiming the bonafide expenditures in the year when these were incurred, but the assessee company claimed lease rent over the lease period. In the entire transaction, the company followed all direct as well as indirect tax compliances which shows bonafide intention of the company rather than indulging in tax evasion. The Ld. AR submitted that it is an undisputed fact that the lessee had been using the assets for his business and transaction was duly recognized through lease deed. The Ld. AR submitted that interest portion has been allowed by the CIT(A) on the same transaction. The Ld. AR pointed out that in the year of intangibles by the assessee to M/s. SREI Equipment Finance Ltd. the Assessee had duly paid the capital gain tax arose on conversion the CWIP into stock in trade which was duly accepted by the revenue. As regards finding of the CIT(A) that the agreement is unsigned, the same was filed before the CIT(A) with the signature of both parties. Thus, the agreement was genuine. Since the intangibles were taken on lease under the master operating lease agreement, the description of assets were not mentioned in the master agreement. The master agreement was omnibus agreement obviating the need to repeated agreements to be entered into in future. The sale agreement of the intangibles filed before the CIT(A) duly described the assets in its schedule 1 and schedule 2 which are sold to the lessor and taken back on lease by the assessee also the invoices raised by the lessor for lease rentals described the assets on which rent was received. The Ld. AR submitted that no rental schedule was fixed by the

agreement in respect of non-existing assets given on lease which is an absurd observation by the assessing officer. The intangibles were taken on lease under the master operating lease agreement the same was decided by the lessor and lessee through rental schedule. M/s. SREI Equipment Finance Ltd. was not having any assets for the purpose of giving on lease to the assessee at the time of agreement, this observation of the CIT(A) is not proper. The master operating lease agreement was executed on 22.12.2009 which covers all future leases of equipments with M/s. SREI Equipments and the assets which were taken under the master agreement and the same were sold by the assessee to the lessor vide agreement dated 29.12.2009. The Ld. AR submitted that the transaction involved is a sale of lease back transaction and the assets involved are intangibles. The assets were internally developed by the assessee itself and sold to the lessor. The assets were developed by the assessee and the same are customize to the peculiar requirements of the assessee which enabled it to operate its business across the country. Any modification in the assets could have hampered the entire business of the assessee and resulting into huge losses. The assets involved in the transaction are intangibles which do not require any physical delivery/ movement. Delivery of passwords, manuals, contents, authorization etc. was duly made which was sufficient to comply with the requirement of sale. The assessee was not having any intention to reduce its tax burden. The lease agreement in which assessee entered into for taking the assets back on lease is an operating lease agreement. Lessor is the owner of the software license and all rights to use the software; lessee shall not have any title to the software; once the lease period expired, lessee to disable authorizations, return all manuals, passwords etc. the updates effected by the lessee to become the property of the lessor on termination of lease. The Ld. AR submitted that to hold the transaction of operating or finance lease one should scrutinize the agreement entered into between the parties. The Ld. AR relied upon the various decisions of the Hon'ble Supreme Court, various High Courts, and Tribunals. The Ld. AR also distinguished decision of the Supreme Court in case of Virtual Soft Systems Ltd. 404 ITR 409. In alternate, the Ld. AR submitted without prejudice to

Ground no. 1 that if it is held that finance lease expenses is not allowable as deduction the depreciation u/s 32 of the Act it allowed of total cost / value of assets taken on finance lease. As regards Ground no. 3, the Ld. AR submitted that the Assessing Officer erred in not granting credit for the tax deducted at source in income tax computation form in name of the assessee as claimed by the return of income. As regards Ground no. 4 levy of interest u/s 234A, 234B and 234C the assessee denies its liability towards such interest. As regards Ground no. 5, the same is consequential.

6. The Ld. DR submitted that the starting point of the claim of assessee is the lease agreement dated 22.12.2009 which in itself is a sham agreement being unsigned by other party M/s. SREI Equipment Finance Pvt. Ltd. and without having any assets to be given on lease and without fixing the rental schedule. The assets which were given on lease have also been provided by the assessee only by selling the software / programs vide agreement dated 29.12.2009 with the condition that the purchaser party would neither modify, reverse, engineer the product, alter, adopt copy of the product and make derivative works out of the product nor would sale or give license of the product to any competitor of NIIT the nature of software / programmers sold by the assessee and taken back on lease also reflects and also admitted by the assessee also that they are purchased and developed by the assessee only exclusively for its un uses. Effectively the software have been purchased / developed and used by the assessee and aforesaid agreements and other documents have been prepared / manufactured just to give the colour of finance lease and to claim the various expenses / deductions by both the parties by reducing their taxable incomes. The Ld. DR submitted that in all practical sense, the customize software purchased and developed by the assessee remain with it only and never moved from its possession, but all the paper work regarding sale and lease back has been done to claim the deductions by both the parties. The assessee claimed the cost of assets as installations and additionally treated it as the interest amount and thus claimed the deductions more than the cost of assets. On the other hand, the corresponding party i.e. M/s. SREI

Equipment Finance Pvt. Ltd. claimed the depreciation on these assets at 60% in their accounts by reducing their taxable income. Thus, both the parties have taken benefit of deductions against the taxable incomes on the basis of sham agreements and manipulating the transactions in guise of finance lease. Thus, the Ld. AR submitted that the decision of the Hon'ble Supreme Court in case of ICDS Ltd. Vs. CIT 350 ITR 527 as well as CIT vs. Virtual Software Systems Ltd. 404 ITR 409 are applicable in the present case. The Ld. DR submitted that the CIT(A) as well as the Assessing Officer rightly made addition of finance lease expenses in assessment year 2012-13 and 2014-15.

7. We have heard both the parties and perused the relevant material available on record. From the records it can be seen that it is an undisputed fact that the lessee had been using the assets for his business purpose and transaction was duly recognized through lease deed. Though the CIT(A) mentioned that the lease deed is unsigned yet the assessee produced the signed copy of the lease deed before us which is genuine. Thus, the agreement cannot be treated as sham and bogus as stated by the Ld. DR during the hearing. In fact, interest portion has been allowed by the CIT(A) on the same transaction. In the year of intangibles by the assessee to M/s. SREI Equipment Finance Ltd. the Assessee had duly paid the capital gain tax arose on conversion of the CWIP into stock in trade which was duly accepted by the revenue. From the sale agreement of the intangibles filed before the CIT(A), the assets were duly described in schedule 1 and schedule 2 which were sold to the lessor and taken back on lease by the assessee. The assessee also raised the invoices for lease rentals describing therein the assets on which rent was received. The intangibles were taken on lease under the master operating lease agreement the same was decided by the lessor and lessee through rental schedule. M/s. SREI Equipment Finance Ltd. was not having any assets for the purpose of giving on lease to the assessee at the time of agreement, this observation of the CIT(A) is contrary to the records available before us. The master operating lease agreement was executed on 22.12.2009 which covers all future leases of

equipments with M/s. SREI Equipments and the assets which were taken under the master agreement and the same were sold by the assessee to the lessor vide agreement dated 29.12.2009. The assets were developed by the assessee and the same are customize to the peculiar requirements of the assessee which enabled it to operate its business across the country. Thus, the submission of the Ld. AR that any modification in the assets could have hampered the entire business of the assessee and resulting into huge losses is correct. The CIT(A) should have looked into the total installment amount which should have been allowed to the assessee during the first appellate proceedings which was not done by the Assessing Officer as well as by the CIT(A). Following expenses were claimed by it as the principal amount during the year in the profit/loss account:

Financial Year	Month	Principal outstanding	Interest	Installment	Principal Repaid
2011-12	Apr-11	9,43,03,120	27,50,420	75,63,555	48,13,135
-ditto-	May-11	8,94,89,985			
-ditto-	June-11	8,94,89,985			
-ditto-	July-11	8,94,89,985	26,39,982	75,63,555	49,23,573
-ditto-	Aug-11	8,45,66,412			
-ditto-	Sep-11	8,45,66,412			
-ditto-	Oct-11	8,45,66,412	25,23,174	75,63,555	50,40,381
-ditto-	Nov-11	7,95,26,031			
-ditto-	Dec-11	7,95,26,031			
-ditto-	Jan-12	7,95,26,031	23,73,896	75,63,555	51,89,659
-ditto-	Feb-12	7,43,36,372			
-ditto-	Mar-12	7,43,36,372			
		TOTAL	1,02,87,472/-	3,02,54,220/-	1,99,66,310/-

The reliance of the Hon'ble Supreme Court decision in case of Virtual Soft Systems will not be applicable in the present case as in the said case it is an admitted case of finance lease transaction and the department was disputing the accounting treatment. But the facts are different in the present case. In the present case the lease rentals constitutes the real business income which was not disputed by the Revenue. Therefore, the CIT(A) as well as the Assessing Officer were not correct in making addition

of Rs. 1,99,66,749/- on account of disallowance of principal portion of the financial lease expenses and treating the same as capital expenditure. Thus, the assessee be granted the benefit of the financial lease expenses on the amount of Rs. 3,02,54,220/-. Ground No. 1, 2, 2.1, 2.2 are allowed.

8. As regards Ground no. 3, the Ld. AR submitted that the Assessing Officer erred in not granting credit for the tax deducted at source in income tax computation form in name of the assessee as claimed by the return of income. The issue is not adjudicated upon by the Assessing Officer therefore, we remand back this issue to the file of the Assessing Officer for adjudication as per the records produced before the Assessing Officer by the assessee. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Thus, Ground No. 3 is partly allowed for statistical purpose.

9. As regards Ground nos. 4 and 5, since the issues are consequential, hence, the same is not adjudicated upon at this juncture.

10. As regards appeal for A.Y. 2014-15, the grounds contested therein are also identical to that of A.Y. 2012-13, therefore, ITA No. 6779/Del/2018 is partly allowed for statistical purpose for the same reasoning.

11. In result, both the appeals of the assessee are partly allowed for statistical purpose.

Order pronounced in the Open Court on 26th JULY, 2019.

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 26/07/2019

Binita

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT

4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	16.07.2019
Date on which the typed draft is placed before the dictating Member	17.07.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	